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IN THE

Supreme Court of the United States

No.

HAROLD JAMES JENKS, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDANT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CITATIONS TO OPINIONS BELOW

The opinion of the Federal District Court is unreported and is printed in Appendix A hereto, page 1a. The opinion of the Court of Appeals, dated March 25, 1975, is not officially reported and is set out in Appendix B hereto, Page 1b.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 25, 1975. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law;..."

United States Code, Title 18, Section 921(a)(3) states:

> "The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler

or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm."

United States Code, Title 18, Section 921(a)(16) states:

"The term 'firearm' means —
(A) any firearm (including any firearm with a matchlock, flintlick, percussion cap or similar type of ignition system) manufactured in or before 1898; and
(b) any replica of any firearm described in subparagraph (A) if such replica
(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or
(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade."

United States Code, Title 18, Section 922(h) states:

"It shall be unlawful for any person —
(1) who is under indictment for , or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
(2) who is a fugitive from justice;
(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act [21 USCS sec. 321(v)]) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954 [26 USCS sec. 4731 (a)]); or
(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;
to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

United States Code, Title 18, Section 922(j) states:

"(j) It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any stolen

firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, or which constitutes, interstate or foreign commerce, knowing or having reasonable cause to believe that the firearm or ammunition was stolen."

Federal Rules of Criminal Procedure, Rule 30, states:

"Instructions. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instructs the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assure an error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury."

Federal Rules of Criminal Procedure, Rule 41(e) states:

"(e) Motion for return of property. — A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of

trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12."

QUESTIONS PRESENTED

I. Whether the admission of physical evidence obtained pursuant to a search was a violation of defendant's Fourth Amendment rights to be free from unreasonable search and seizure where the warrant was obtained without probable cause and as a result of an affidavit supported by an unnamed, confidential informer but unsupported by the underlying circumstances of how the confidential informant obtained his information or the source of that information.

II. Whether a judgment of aquittal to count one of the indictment, charging the defendant with violation of Title 18, U. S. C. Section 922(j) should have been entered where the government failed to prove that the items were "firearms" as defined in Section 921(a)(3) of Title 18, United States Code, that the defendant had knowledge that the alleged firearms were stolen, and that the alleged firearms were a part of or moving in interstate commerce.

III. Whether in an indictment charging the defendant with violation of Title 18, U. S. C. Section 922(j) the trial court erred in not properly instructing the jury as to the correct definition of firearms as defined in Section 921(a)(3), Title 18, U. S. C., and by not properly instructing the jury as to the required proof to find that the goods were a part of interstate commerce, and by instructing the jury without evidence that the guns were firearms within the context of Section 922(j), Title 18, U. S. C.

IV. Whether prejudicial error resulted from the misconduct of the United States Attorney, when in his

closing statement he made statements of fact to the jury within his own personal knowledge which were not in evidence.

V. Whether a dismissal should have been entered to count one of the indictment charging the defendant with violation of Title 18, U. S. C., Section 922(j) where count one of the indictment charged the defendant with the actual transporting of the alleged stolen firearms but the Court found from the evidence that the defendant had not transported firearms.

STATEMENT OF THE CASE

On October 2, 1973, a search was conducted of a residence and garage at 1131 Beaumont Street, Dayton, Ohio, pursuant to a search warrant, issued upon an affidavit given by Treasury Agent Carroll Gibson. No incriminating evidence was found in the house, however, a large collection of antique replica guns which had been stolen from Eph Gose in New Tazwell, Tennessee, was found in the garage.

Petitioner was tried on a two-count indictment charging him with a violation of Title 18, U. S. C. 922(j) in that he "knowingly transported, received, concealed and stored stolen firearms . . ." and a violation of 18 U. S. C. 2314 in that he " . . . did transport in interstate commerce . . . stolen goods, wares and merchandise, that is 224 firearms . . . knowing the same to have been stolen . . ." This was the trial court's basis for jurisdiction.

The facts in the affidavit pursuant to which the search warrant was issued established that an unnamed confidential informant had told Agent Gibson that the guns were being stored at 1131 Beaumont Street. The affidavit did not set forth the underlying circumstances or the source from which the informant

concluded the arms were being stored at 1131 Beaumont Street.

On January 18, 1974, petitioner moved that the Court suppress the evidence of all firearms seized in the October 2, 1973, search of the 1131 Beaumont Street premises pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. This motion was overruled by the District Court on March 5, 1974.

At the close of the prosecution's evidence, petitioner moved for a dismissal of the first and second count of the indictment and a motion for acquittal. The second count, which charged the petitioner with a violation of 18 U. S. C. 2314, was dismissed due to a lack of evidence to connect petitioner with the theft and the interstate transportation of the firearms. The motion to dismiss as to the first count was overruled.

As to the first count, there was no direct evidence showing that petitioner was in actual or constructive possession of the stolen property. The premises of 1131 Beaumont Street was neither owned, rented, nor occupied by petitioner. The actual evidence showed that: (1) Petitioner had in September or October of 1973 offered to purchase the premises, which offer was refused. (2) Petitioner had dated a lessee of the premises on two occasions. (3) Petitioner had been seen in or near the house on three occasions by Agent Gibson during late September and early October of 1973. (4) That petitioner had been seen carrying boxes by Agent Gibson that in his opinion resembled gun boxes. (5) That at the time of petitioner's arrest, he was a passenger in a van which was driven by the co-defendant and which belonged to neither of the two and experts for the government testified that some of the items found in the rear of the van, such as a key

and pieces of cardboard, could be traced to the gun boxes in question. (6) That the only fingerprints belonging to petitioner found among several hundred items were two fingerprints and a small palmprint found on the cardboard boxes.

A motion for dismissal and a motion for acquittal were again made at the conclusion of all the evidence and were overruled.

The prosecutor failed to offer evidence to establish that the stolen guns were firearms within the meaning of Section 921, et seq., Title 18, United States Code. Further, there was no evidence offered to prove that the guns were capable of discharging a projectile. Despite this lack of proof the Court instructed the jury that the guns were firearms within the meaning of Title 18, U. S. C. Section 922(j). To this instruction petitioner duly objected. The Court also instructed that the government must prove the stolen firearms were moved in interstate commerce in the State of Ohio. Petitioner ented a specific objection to this instruction.

During the closing argument, the assistant United States Attorney referred to a "large organization and a continuing investigation." There was no evidence of a "continuing investigation" or a "large organization" in the record and the statements were made of the prosecutor's personal knowledge. Petitioner timely objected and moved for a mistrial which motion was denied. Furthermore, the Court failed to give an instruction concerning the prosecutor's remarks.

Petitioner moved the Court for judgment notwithstanding the verdict. This motion was overruled.

The Court sentenced petitioner to a term of six years.

On appeal to the Sixth Circuit Court of Appeals, the Court affirmed the District Court on all assign-

ments of error except the sentence, which was reversed because it was in excess of the maximum provided by law.

ARGUMENT

1. Certiorari Should Be Granted Because the Decision of the Court Below, Upon the Issue Set Forth in Question I of the Questions Presented Is in Conflict With the Decisions in *Aguilar* v. *State of Texas*, 378 U. S. 108 (1964) and *Spinelli* v. *United States*, 393 U. S. 410 (1969).

The 224 firearms which are the subject of the indictment returned against defendant-appellant were seized by agents of the Alcohol, Tobacco, and Firearms Division of the United States Treasury Department pursuant to a search warrant issued by the United States Magistrate authorizing the search of a residence located at 1131 Beaumont Street, Dayton, Ohio, for stolen firearms. The search warrant was issued on the basis of an affidavit of Agent Carroll Gibson, Special Agent, Bureau of Alcohol, Tobacco, and Firearms. The affidavit read in part as follows:

> "That he has reason to believe that on the premises known as the John G. Jinks residence, consisting of a white two story frame residence with a grey roof and having the numbers 1131 displayed on the front of the building. Being further located at 1131 Beaumont Street, Dayton, Montgomery County, Ohio, including all outbuildings and appurtenances thereto, in the Southern Judicial District of Ohio there is now being concealed certain property, namely a large number of stolen firearms which were stolen in the State of Tennessee, being a collection of Winchester Brand, Commerative lever action rifles and several other rifles and pistols of the World War II vintage, further described as consisting of two .30-30 Winchester rifles, Model 94 with serial numbers of 21404 and 21826 which are possessed and stored in violation of Section 922(j), Title 18, U. S. C.

> And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: On Thursday, September 27, 1973, I was contacted by a confidential informer who has proven to be reliable in the past two months on three (3) separate occasions. On two of the occasions this informer furnished information which resulted in the seizure of illegal weapons. Said informer reported to me that there is now being concealed a large number of stolen firearms being stored at the above described location and that these firearms are now for sale as 'Hot' guns (Stolen firearms). The informer further reports that the firearms are allegedly stolen from the Tennessee area, and that these guns are primarily Winchester Lever Action rifles.
>
> My investigation into this matter led me to contact Special Agent Grant McGarity, Knoxville, Tennessee. Special Agent McGarity informed me that there had been a large collection consisting of over 300 firearms stolen from the Knoxville area on Sept. 26, 1973 and that this collection consisted of Winchester Brand Lever action rifles, Commerative (sic) models. I have obtained serial numbers of some of these firearms from Special Agent McGarity.
>
> I have been advised that John G. Jinks has a reputation of dealing in stolen merchandise and firearms by Detective Dick Walley, Dayton, Police, Dept."

The Fourth Amendment to the United States Constitution protects the defendant Harold Jenks against unreasonable searches and seizures and further provides that "no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." To justify a search under the Fourth Amendment the facts set forth in the affidavit

in support of the application for a search warrant must establish probable cause to believe that the items sought are in fact seizable by virtue of being connected with criminal activity and that the items will be found in the place to be searched. *Carroll* v. *U. S.*, 267 U. S. 132 (1925); *Brinegar* v. *U. S.*, 338 U. S. 160 (1949); *U. S.* v. *Dosser,* 339 Fed. 2d 102 (6th Cir. 1964) cert. denied 382 U. S. 318.

It is well established that in a Federal prosecution the Fourth Amendment bars the use of evidence seized through an illegal search and seizure [*Weeks* v. *United States,* 232 U. S. 383 (1914)], and further, Federal criminal procedure allows for the suppression of evidence seized under a warrant where "There was not probable cause for believing the existance of the grounds on which the warrant was issued . . ." (Rule 41(e), Federal Rules of Criminal Procedure.)

In the case at bar, the facts set forth in support of the search warrant do not establish probable cause to believe that the alleged firearms were on the premises to be searched at the time the search warrant was issued. The facts supporting the agent's belief that alleged stolen firearms were located on the premises at 1131 Beaumont Street is based upon information allegedly supplied by an unnamed, confidential informer. It is settled that hearsay statements of an unidentified informant are insufficient to establish probable cause unless the affidavit sets forth facts informing the Magistrate of some of the underlying circumstances from which the informant concluded that items subject to seizure were where the informant claimed they were and some of the underlying circumstances from which the officer concluded that the informant was credible and his information reliable. *Aguilar* v. *State of Texas,* supra; *Spinelli* v. *United States,* supra.

Although the affidavit in support of the search warrant satisfies the requirement that the underlying circumstances set forth show the informant to be "credible" and his information "reliable" in the case at bar, the affidavit does not set forth the underlying circumstances from which the informant concluded that the 224 firearms were located at 1131 Beaumont Street at the time of the search nor the underlying circumstances from which the informant concluded that the alleged stolen firearms from Tennessee were the same firearms which were located at the 1131 Beaumont address at the time of the search. In other words, there was nothing set forth in the affidavit from which the Magistrate could learn the source of the informant's information nor from which the Magistrate could conclude that the unnamed informant was in a position to know that any alleged stolen firearms, and specifically, the alleged stolen Tennessee firearms, were on the premises at 1131 Beaumont Street in Dayton. Since the affidavit failed to set forth facts showing these underlying circumstances, and the affidavit is the only source that a Magistrate can consider in determining probable cause for a search warrant, *Aguilar* v. *State of Texas,* supra, the Magistrate could not have known whether the hearsay statements of the unnamed informant were anything more than just "casual rumors circulating in the underworld", contrary to the dictates of *Spinelli* v. *United States,* supra at 393, and the affidavit was insufficient to constitute the required showing of probable cause under the Fourth Amendment.

Further, other statements in the affidavit that Agent Gibson had been advised a large collection of firearms were stolen in Knoxville, Tennessee or that John G. Jinks had a reputation of dealing in stolen merchandise and firearms were not sufficient to cure the otherwise

defective affidavit and establish probable cause according to *Spinelli* v. *United States,* supra, at 418-419.

In the case at bar, the defendant has standing to challenge the validity of the search and seizure under the established rule that one charged with a crime of which possession is an essential element, as in the case at bar, has standing to challenge the validity of the search, without regard to whether he asserts an invasion of his privacy because of either a proprietary or possessory interest in the premises. *Jones* v. *United States,* 362 U.S. 257 (1960); *Simmons* v. *United States,* 390 U.S. 377 (1968); *Colosimo* v. *Perini,* 415 Fed. 2d 804, 805 (6th Cir. 1969).

A review of the allegations of the affidavit herein in their totality does not establish probable cause to believe that alleged stolen firearms were located at the Beaumont Street address at the time the search warrant was issued. Although the affidavit of Agent Gibson sets forth facts advising the Magistrate as to the grounds upon which he concluded that this unnamed informant was reliable, the affidavit submitted herein is fatally deficient in that it fails to set forth the underlying circumstances from which the Magistrate could independantly judge the validity of the informant's conclusion that stolen firearms were located at the Beaumont Street address. The affidavit does not set forth facts showing that the unnamed informant's information as to the location of the firearms was based on personal knowledge. Nor does the affidavit set forth facts showing that the informant obtained his information from other sources and that these sources were reliable.

2. Certiorari Should Be Granted Because the Decision of the Court Below, Upon the Issue Set Forth in Question II of the Questions Presented, Is in Conflict With the Decisions in *United States* v.

Ruffin, 490 F. 2d 557 (8th Cir., 1974); *Booth* v. *United States*, 154 Fed. 2d 73 (9th Cir., 1946); *Schwachter* v. *United States*, 237 Fed 2d 640 (6th Cir., 1956); *U.S.* v. *Ross*, 92 U.S. 281.

The defendant was found guilty of having violated Section 922(j), Title 18, United States Code, which provides as follows:

> "It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, or which constitutes interstate or foreign commerce, knowing or having reasonable cause to believe that the firearm or ammunition was stolen."

The indictments under which the defendant was charged reads as follows:

COUNT I

On or about the 2nd day of October, 1973, in the Southern District of Ohio, HAROLD JAMES JENKS, knowingly transported, received, concealed and stored stolen firearms, that is 224 firearms which had been stolen from New Tazwell, in the State of Tennessee and moved in interstate commerce to Dayton in the State of Ohio, knowing and having reasonable cause to believe the firearms to have been stolen; in violation of Sections 922(j) and 924(a), Title 18, United States Code.

COUNT II

On or about the 2nd day of October, 1973, HAROLD JAMES JENKS, did transport in interstate commerce from New Tazwell in the State of Tennessee, to Dayton in the State of Ohio in the Southern District of Ohio, stolen goods, wares and merchandise, that is, 224 firearms, of the value of approximately $70,000 knowing

the same to have been stolen in violation of Section 2314, Title 18, United States Code.

At the trial, the lower Court dismissed count two of the indictment against the defendant for the reason that the government had provided no evidence that defendant-appellant had transported any of the stolen firearms in interstate commerce.

At the conclusion of the government's case, at the conclusion of all the evidence, and after a guilty verdict had been returned by the jury against the defendant, defendant moved for a directed judgment of acquittal as to count one of the indictment. The trial Court overruled said motions. The basis of the said motions was that the government had failed to provide evidence that the firearms in questions were firearms as defined in Section 921 of Title 18, United States Code, as the term is used in Section 922(j) of the United States Code. Second, that count one of the indictment had charged that defendant knowingly transported, received, concealed and stored stolen firearms and that being held to strict proof of the allegations the government had not shown evidence that defendant transported the firearms. Third, that the government had shown no evidence that the firearms were moving as, or a part of, or that they constituted interstate or foreign commerce.

It is recognized that in considering whether a directed verdict of acquittal should have been entered the Court must assume that all evidence and reasonable inferences to be drawn therefrom are to be viewed in a light most favorable to the government. *U.S.* v. *LaRose,* 459 Fed. 2d 361 (6th Cir., 1972).

Section 921(a)(3) of Title 18 of the United States Code defines firearms as follows:

> "The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or

> may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (c) any firearm muffler or firearm silencer; of (D) any destructive device. Such term does not include an antique firearm."

Although the only testimony at trial was that the guns were antique replica firearms, the Court not only failed to direct a verdict, but charged the jury that the guns were firearms as a matter of law. The Court required no evidence, and there was presented no evidence, that the guns were firearms as above defined. Without any such proof and viewing the evidence in a light most favorable to the government, the government failed to prove the element of stolen firearms under Title 18, Section 922(j) of the United States Code.

Second, since the government's indictment in count one charged that the defendant "transported" the alleged stolen guns in "interstate commerce", it was incumbent upon the government to present evidence to this issue and prove it. However, the government did not present any evidence that defendant transported the guns in interstate commerce and the Court dismissed count two of the indictment because there was no proof that defendant had transported the guns. Thus, viewing the evidence in a light most favorable to the government, the government failed to prove yet another element of their indictment in count one.

In addition to the glaring failure of proof heretofore raised, there is the more sophisticated question regarding the interpretation of Section 922(j) of Title 18. The only case which counsel for defendant-appellant has found which construed Section 922(j) is the case of *United States* v. *Ruffin,* supra. In the *Ruffin* case, the Court had before it the same question presented here and the Court in following the rationale found in the

dicta of the Supreme Court of the United States in *U.S. v. Bass*, 404 U.S. 836, 92 Su. Ct. 515, 30 L. Ed. 2d 488 (1971), reversed the conviction of the Ruffin brothers. The Court in the *Bass* case left open the exact reach of Title 18, (*Bass*, supra, at page 343, N. 10, 92 S. Ct. at 520), but it noted that Title 18 apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation." *Id.* at 342-343, 92 S. Ct. at 520. Section 922(j) applies to a firearm "which is moving as, which is a part of, or which constitutes an interstate or foreign commerce." In the *Ruffin* case the Court held that Section 922(j) requires proof of transactions that are a part of an interstate transaction. The court held that the statutory language clearly requires a continuing relationship with interstate commerce at the time of the alleged concealment. The Court noted that the language relating to interstate commerce under Section 922(j) is virtually identical to the earlier language of the National Stolen Property Act and its successor statutes. 18 U.S.C., Section 2313 and 1215. The Court in *Ruffin* made an analysis of the decisions under these statutes for the purpose of guiding it and reaching a decision under Section 922(j). The Court concluded from this analysis that unexplained possession of stolen property shortly after it has been transported from another state was insufficient to establish that the property was a part of interstate commerce (*Booth* v. *United States*, supra) and that evidence that property was stolen from another state by itself was insufficient to prove that the property was still moving in interstate commerce, which a jury would necessarily have to infer to convict (*Schwachter* v. *United States*, supra). Thus, the mere fact that property stolen in Tennessee was found in Ohio is not sufficient

by itself to show the goods were a part of interstate commerce at the time of the alleged crime in Ohio.

Following the reasoning in *U.S.* v. *Ruffin*, supra, as stated above, defendant Jenks is entitled to a reversal of his conviction. The strongest evidence the government could produce was to the effect that defendant had made a written offer to purchase the house including the garage in which the guns were found, which offer was not accepted by the seller. In addition, defendant had occasionally dated one of the women who was a tenant of this residence, but he did not reside there, but lived in a home with his wife and children at Fairborn, Ohio, some ten or fifteen miles from the 1131 Beaumont Street address. There was no proof that defendant-appellant exercised dominion or control over the house or garage at any time. In fact, the government's proof was to the contrary. Although it is argued that this evidence is not sufficient to prove possession, either constructive or actual, viewing it in a light most favorable to the government a jury could infer possession, assuming defendant's argument fails.

Taking this inference of possession and evidence that the guns had been stolen in Tennessee from which the jury must necessarily have infered that the guns were a part of interstate commerce, contrary to the *Ruffin* case, supra, and there being no evidence presented by the government that defendant had knowledge that the guns were stolen, a finding of guilty rests on an inference that the defendant had knowledge the guns were stolen because of his possession and the stolen guns were a part of interstate commerce. This would be to allow an inference on another inference to prove the material element of knowledge, which is universally condemned. 29 *Am. Jur.* 2d, Section 166, pg. 205; *U.S.* v. *Ross*, 92 U.S. 281, 23 L. Ed. 707.

Therefore, in following the *Ruffin* and *Ross* cases, supra, and viewing the evidence most favorable to the government, the evidence failed to establish that the guns were a part of interstate commerce, that defendant had possession of them, and that the defendant had knowledge of the stolen character of the guns. To hold that this circumstantial evidence sufficient to convict would also be contrary to the Fifth Amendment to the United States Constitution amounting to comment upon defendant's failure to explain circumstantial evidence by refusing to take the witness stand to rebut the conclusion of unexplained possession found from the facts which gave rise to the first inference.

3. Certiorari Should Be Granted Because the Decision of the Court Below, Upon the Issue Set Forth in Question III of the Questions Presented, Are in Conflict With the Decisions in *United States* v. *Ruffin*, 490 Fed. 2d 557 (8th Cir., 1974); *Schwachter* v. *U.S.*, 237 Fed 2d 640 (6th Cir., 1956).

In any criminal case it is necessary and incumbant upon the government to prove to the jury beyond a reasonable doubt every essential element of the offense charged in the indictment. *Christoffel* v. *U.S.*, 388 U.S. 84, 89, 69, S. Ct. 1447, 93 L. 1826; *Boatright* v. *U.S.* (8th Cir.), 105 Fed. 2d 737, 740. The trial judge in a criminal case may not direct the jury to find a contoverted material fact against the defendant. *Kouda* v. *U.S.*, (7th Cir.), 166 Fed. 91; *U.S.* v. *Gollin*, (3rd Cir.), 166 Fed. 2d 123; *Schwachter* v. *U.S.*, 237 Fed. 2d 640 (1956). This issue pertains to two errors in the Courts instructions, and the same are hereinafter discussed individually:

(1) The Court erred in its instructions to the jury as to the definition of firearms within the meaning of Section 922(j), Title 18, United States Code. The only evidence was that the gun collection consisted of antique replicas, not capable of firing ammunition commonly

found in the market places of the United States and sold as a common type of ammunition. The fact of the matter is, the government did not even produce evidence that these guns were capable of firing any type of ammunition. The Court and the jury could only speculate as to whether or not these weapons were manufactured for or were capable of firing. At the conclusion of all the evidence, the Court charged the jury, after reading Title 18, Section 922(j), that: "The firearms or collection of firearms in this case are firearms within the context of this Statute.".

This was the only instruction given by the Court to the jury in regard to the definition of "firearms" under the Act, although firearms is specifically defined in Title 18, Section 921 of the United States Code. To this charge, defendant pursuant to Rule 30 of the Federal Rules of Criminal Procedure, entered a specific objection, which was ignored by the Court. The instruction on its face advised the jury that the stolen gun collection in question consisted of "firearms" as a matter of law and therefore effectively took the question as to this element of the offense from the jury. This action by the Court was contrary to law and prejudicial to defendant-appellant's case thereby entitling him to a reversal of the verdict and judgment.

A second instruction given by the Court to the jury which defendant-appellant claims to be erroneous is that part of the instruction dealing with the element of interstate nexus. The Court's instruction to the jury on this element consisted of the Court reading Section 922(j) to the jury, and in describing the essential elements of the crime which made up the offense, and the Court stated that the government must prove that the stolen firearms were moved in interstate commerce in the State of Ohio. To this instruction, defendant-

appellant, through counsel, again entered his specific objection.

In *United States* v. *Craven,* 478 Fed. 2d 1329 (6th Cir., 1973), the Court discussed the interstate commerce requirement as an element of the offense under Section 922(h), Title 18, United States Code, and in that case the Court of Appeals stated that this section does not extend to firearms which have merely previously been transported interstate. In *United States* v. *Ruffin,* supra, the Court held that the only reasonable construction of Section 922(j) of Title 18 like Section 922(h) of that same title required proof of transactions that are a part of interstate transactions. The Court further held that the statutory language clearly requests a continuing relationship with interstate commerce at the time of the alleged concealment. There can be no doubt that the Court inaccurately described the necessary proof.

Either of the two errors contained in this issue unquestionably entitles the defendant-appellant to a reversal of the verdict due to the obvious inherent prejudicial nature of such errors.

4. Certiorari Should Be Granted Because the Decision of the Court Below, Upon the Issue Set Forth in Question IV of the Questions Presented Is in Conflict With the Decisions in *Burger* v. *U.S.,* 295 U.S. 78; *Williams* v. *U.S.,* 168 U.S. 382; *Hall* v. *U.S.,* 150 U.S. 76.

During closing argument the Assistant United States Attorney committed an act of misconduct in his closing remarks to the jury when he referred to a "large organization and a continuing investigation" as supportive of his position of the defendant Jenk's guilt when there was no evidence to any organization or any continuing investigations in evidence, so that the remarks were made to inflame the jury and prejudice the defendant in the manner hereinafter described.

The evidence presented by the government was such that a jury would reasonably inquire as to defendant's guilt by comparing much stronger evidence against individuals who had not been charged or tried for the crime or crimes relative to the stolen firearms.

During the trial evidence was presented which implicated a minimum of five other individuals to either the burglary in Tennessee, the gun collection, the residence at 1131 Beaumont Street, Dayton, Ohio, or a truck which contained cardboard connected with the gun collection. However, there was no evidence connecting defendant to the burglary or the truck, and no evidence showing defendant had access to or dominion over the garage where the guns were located.

Considering this evidence, without the prosecutor's statements, it can reasonably be assumed that should the jury have reached a conclusion that there was comparatively stronger evidence in the record against these other persons, than there was against defendant-appellant, and that therefore any one, part or all could have been guilty of the crime charged and defendant-appellant innocent. However, if the jurors, or any one of them, accepted the prosecutor's statement as true that defendant was involved in a large organization as such facts were within his personal knowledge, he, she or they would be reasonably induced to compound such evidence against the defendant by including him in the group and/or organization, so as to impute his guilt or nullify any reasonable doubt of guilt the juror or jurors may have had prior to the making of such statement by the prosecutor. This action of the prosecutor was not only willful, but was well calculated and effectively prevented the defendant-appellant from having a fair trial and receiving a fair verdict. Although counsel objected to the statement and moved for mistrial, the Court

overruled the objection and motion and did not even instruct the jury to disregard the statement.

Counsel should never in the course of argument state facts which are based upon his own personal knowledge, regardless of their relevancy to the issues at bar, since if he desires to get such facts before the jury, he should take the stand and present such facts in a legitimate manner. *Hall* v. *U.S.*, (4th Cir.) S. Carolina, 256 Fed. 748. This rule is especially applicable to the prosecuting attorney, since his official position as a representative of the people carries wuch weight with the jury that if statements of fact predicted on his knowledge rather than on the evidence, constitutes reversible error. However, statements made by the prosecutor in the present case, when considered in connection with the evidence in the case was so impressive and prejudicial that it deprived defendant-appellant of a fair trial within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution and fell far below the basic fairness expected in the conduct of a criminal case.

Further, it is well settled that a statement by counsel in argument of facts not in evidence or a misstatement of the evidence is generally regarded as reversible error. *Burger* v. *U.S.*, 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629; *Williams* v. *U.S.*, 168 U.S. 382, 42 L. Ed. 509, 18 S. Ct. 92; *Hall* v. *U.S.*, 150 U.S. 76, 37 L. Ed. 1003, 14 S. Ct. 22, especially if the statement of facts not in evidence is willful. *Waldren* v. *Waldren*, 156 U.S. 361, 39 L. Ed. 453, 14 S. Ct. 383.

5. Certiorari Should Be Granted Because the Decision of the Court Below, Upon the Issue Set Forth in Question V of the Questions Presented Is in Conflict with the Decisions of *U.S.* v. *Ruffin*, 490 Fed. 2d 557 (8th Cir., 1974); *U.S.* v. *Bass*, 404 U.S. 336 (1971); *U.S.* v. *Craven*, 478 Fed. 2d 1329 (6th Cir., 1973).

Count one of the indictment charges that: "On or about the second day of October, 1973, in the southern district of Ohio, Harold James Jenks, knowingly transported, received, concealed and stored stolen firearms, that is 224 firearms which had been stolen from New Tazwell, in the State of Tennessee, and moved in interstate commerce to Dayton, in the State of Ohio, knowing and having reasonable cause to believe the firearms to have been stolen; in violation of Sections 922(j) and 924(a), Title 18, United States Code."

At the conclusion of the State's case, the defendant-appellant, through counsel, in addition to making a motion for judgment of acquittal, moved the Court for a dismissal of count one of the indictment. The Court overruled this motion.

According to the language of Section 922(j) and the manner in which the Courts have interpreted the interstate provision of such section, to wit: that stolen firearms must be moving as, being a part of, or constitute interstate or foreign commerce at the time the offense is committed, count one of the indictment is insufficient.

At the conclusion of the evidence, the Court found as a matter of law that the defendant-appellant did not *transport* said firearms in interstate commerce, which was the Court's basis for dismissing count two of the indictment against defendant-appellant. The second reference to interstate commerce as found in count one of the indictment merely alleges that the firearms *moved* in interstate commerce to Dayton, Ohio, thus speaking in the past tense and therefore could not support a conviction for violation of Section 922(j), which Section requires that the crime occur during a time when the goods are moving or are a part of interstate commerce in the present tense. See *U.S.* v. *Bass,* supra; *U.S.* v. *Ruffin,* supra; *U.S.* v. *Craven,* supra.

The defendant-appellant attempted to clarify the indictment in this regard by filing a motion for a bill of particulars, specifically asking for details of the interstate transportation. The Court overruled this motion for a bill of particulars by simply not ruling on said motion along with other preliminary motions, although the Court stated on several occasions throughout the trial that it would at some point rule on them.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM J. ABRAHAM
William J. Abraham

DAVID K. PURKEY
David K. Purkey
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Columbus, Ohio 43215
Counsel for Petitioner

CERTIFICATE

The undersigned hereby certifies that he is duly admitted to practice before this Court and that he has personally served a copy of the Writ of Certiorari upon William W. Milligan, United States Attorney, Robert Zitco, Assistant United States Attorney for the Southern District of Ohio, Marconi and Gay Streets, Columbus, Ohio, and Harry H. Ellis, Esq., Regional Counsel, Bureau of Tobacco, Alcohol and Firearms, 550 Main Street, Cincinnati, Ohio, this 21st day of April, 1975.

William J. Abraham

David K. Purkey

David K. Purkey
Counsel for Defendant-Appellant

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CRIMINAL No. 5356

UNITED STATES OF AMERICA, *Plaintiff,*

v.

HAROLD JAMES JENKS, *Defendant,*

March 5, 1974

This cause comes on to be considered pursuant to the motion of defendant herein to suppress certain evidence seized pursuant to a search warrant which was based on an affidavit allegedly violating the standards required for such affidavits by the Fourth Amendment to the Federal Constitution. See, F.R. Cr. P. 41(e).

The defendant has been criminally charged under a two count indictment alleging that he violated 18 U.S.C. § § 922(j), 914(a), and 2314. The precise question for the Court to consider at this time is whether the affidavit on which the search warrant in the present case was based set forth sufficient facts to establish probable case for belief that the search warrant in question should issue. The concern of course, is whether the warrant was issued pursuant to the neutral and detached judgment of a judicial officer (here the U.S. Magistrate), as opposed to a perfunctory approval of the request of a law enforcement officer. The defendant in this case strives mightily to bring his motion to suppress under the strict terms of the pronouncement of the United States Supreme Court in the case of *Aguilar* v. *Texas, 378 U.S. 108 (1964),* as expatiated upon in *Spinelli* v. *U.S. 393 U.S. 410 (1969).* The affidavit complained of contains the following wording:

> "That he has reason to believe that on the premises known as the John G. Jinks residence, consisting of a white two

story frame residence with a grey roof and having the numbers 1131 displayed on the front of the building. Being further located at 1311 Beaumont Street, Dayton, Montgomery County, Ohio, including all outbuildings and appurtenances thereto, in the Southern Judicial District of Ohio there is now being concealed certain property, namely a large number of stolen firearms which were stolen in the State of Tennessee, being a collection of Winchester Brand, Commerative lever action rifles and several other rifles and pistols of the World War II vintage, further described as consisting of two .30-30 Winchester rifles, Model 94 with serial numbers of 21404 and 21816 which are possessed and stored in violation of Section 922(j), Title 18, U.S.C.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: On Thursday, September 27, 1973, I was contacted by a confidential informer who has proven to be reliable in the past two months on three (3) separate occasions. On two of these occasions this informer furnished information which resulted in the seizure of illegal weapons. Said informer reported to me that there is now being concealed a large number of stolen firearms being stored at the above described location and that these firearms are now for sale as "Hot" guns (Stolen firearms). The informer further reports that the firearms are allegedly stolen from the Tennessee area, and that these guns are primarily Winchester Lever Action rifles.

My investigation into this matter led me to contact Special Agent Grant McGarity, Knoxville, Tennessee. Special Agent McGarity informed me that there had been a large collection consisting of over 300 firearms stolen from the Knoxville area on Sept. 26, 1973 and that this collection consisted of Commerative (sic) models. I have obtained serial numbers of some of these firearms from Special Agent McGarity.

I have been adivsed that John G. Jinks has a reputation of dealing in stolen merchandise and firearms by Detective Dick Walley, Dayton, Police Dept."

This Court of course is bound by the holdings of the Supreme Court in the *Aguilar* and *Spinelli* cases. But it must be remembered that in both of these cases the Supreme Court was faced with two extremely under-developed affidavits

which purported to establish "probably cause" sufficient to enable a detached magistrate to objectively determine that search warrants should issue. The Court ruled that evidence seized pursuant to warrants based on such affidavits had to be suppressed.

Defendant argues that the two-pronged test for the sufficiency of a search warrant affidavit, as outlined in *Spinelli* v. *U.S., 393 U.S. at 413,* was not met in this case. However, since the result in Spinelli is expressly based on and an outgrowth of *Aguilar* v. *Texeas, supra,* the question of whether this is an *Aguilar* type case is the logically prior issue before the Court, for in *Spinelli* it was said that:

> "If the tip [of the government informer] is found inadequate under *Aguilar* the other allegations which corroborate the information contained in the hearsay report should then be considered." (brackets added), 393 U.S. at 415.

The threshold question for this Court to consider is therefore, "When are the strict standards enumciated in *Aguilar*, as expatiated upon in *Spinelli*, applicable to Fourth Amendment scrutiny of a search warrant affidavit?" The Supreme Court clearly answered this most pertinent question in *U.S.* v. *Harris, 401 U.S. 573 (1971):*

> "The Court of Appeals relied on Aguilar v. Texas . . . in which we held that an affidavit based *solely on the hearsay report of an unidentified informant* must set forth some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable'." 403 U.S. at 576 (emphasis added) see also, U.S. v. Ventresca, 380 U.S. 102 (1965).

Thus, the *Aguilar-Spinelli* test applied only when the clearly narrow instance of an affidavit based "solely on the hearsay report of an unidentified informant" is before the Court. Such is not the present case. In addition to "the hearsay report of an unidentified informant", the present affidavit established at least that the officer in question had specific personal knowledge that a large number of firearms had been stolen from the Knoxville, Tennessee area, that the of-

ficer knew the serial numbers of some of these firearms, that the officer had been advised as to certain particulars by contacts with federal law enforcement officers in Knoxville, Tennessee and a local officer in Dayton, Ohio, which led him to seek a search warrant and further that the Dayton, Ohio police officer had related that a person located at the residence here in question had a reputation for dealing in stolen firearms. Surely, this comprises more than the narrow reliance on an "unidentified informer" which was severely circumscribed in *Aguilar*. Just as surely, the legal standards traditionally required for the issuance of a search warrant were met in this case. The *Aguilar-Spinelli* test is simply in opposite here.

Assuming, *arguendo*, that the two-pronged *Aguilar-Sepinelli* test did apply herein, the Court is of the opinion that the present affidavid would satisfy it. The two-pronged test would require that if the warrant is based (entirely, which is not so here) on the hearsay report of unidentified informants that: 1) the affidavit must set forth "underlying circumstances" sufficient to enable the magistrate to independently adjudge the validity of the informant's conclusion, and, 2) that the affiant officer's support their claim that their informant was 'credible' or his information 'reliable.' See, *Spinelli* v. *U.S., 393 U.S. at 413.* The first prong of this test must be satisfied only if the 'tip' of the unidentified informant is the *sole* basis of the affidavit, *U.S.* v. *Harris, supra, at 576,* which was clearly not the case here. Even if the "tip" did fail the *Aguilar-Spinelli* test, then the corroborative allegations in the affidavit would have to be considered, *Spinelli* v. *U.S., supra, at 415,* and those corroborations in the present affidavit would clearly justify a neutral magistrate in the issuance of a warrant. The first prong of the test is thus met, or the necessity for meeting it obviated, in the present case. The second prong of the test, that the informant was credible or reliable, is even more surely met in this case. The law enforcement officer stated that the informant had furnished correct information on three occasions in the last two months. Two of these occasions had concerned illegal firearms. (This case concerns

illegal firearms). The informer said the guns were for sale. The agent had independent knowledge of this. The informant said the guns were from Tennessee. The agent had independent knowledge of this. The informer said the guns were "Winchester type rifles." The agent had independent knowledge of this. Surely, only a derelict agent (indeed a derelict magistrate) would find such a "tip" unreliable or incredible. Thus, even though the *Aguilar-Spinelli* test does not apply to this case, it is satisfied even if it does.

Defendants should be aware of the narrow parameters of the *Aguilar-Spinelli* test. The exclusionary rule does not crash down like a steel trap on the hands of law enforcers just because they make use of "unidentified confidential informers." To such a facile taxonomy, Fourth Amendment values do not lend themselves.

Wherefore, it is the judgment of this Court that the motion of defendant herein to suppress the evidence seized by the search warrant in question should be and the same hereby is OVERRULED.

S/Carl A. Weinman

JUDGE, U.S. DISTRICT COURT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-2250

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

HAROLD JAMES JENKS, *Defendant-Appellant*

Filed March 25, 1975

Before: CELEBREZZE, MILLER and ENGEL, Circuit Judges.

This is a direct appeal of appellant's conviction on one count for transporting stolen firearms, in violation of 18 U.S.C. § 922(j). Appellant was found guilty by a jury and sentenced to six years imprisonment.

Six issues are presented on appeal: (1) Whether the court erred in overruling appellant's motion to suppress evidence obtained by an allegedly illegal search and seizure; (2) Whether the court erred in overruling appellant's motion for acquittal; (3) Whether the court erred in instructing the jury that the guns in question were "firearms" within the meaning of 18 U.S.C. § 922(j) and in its instructions with reference to the statute's interstate commerce requirement; (4) Whether the sentence imposed by the court is void as being in excess of the maximum provided by law; (5) Whether the court erred in overruling appellant's motion for a mistrial based on alleged misconduct on the part of the United States Attorney during the presentation of the government's closing argument; and (6) Whether the court erred in overruling defendant's motion to dismiss the indictment.

Upon consideration, we are of the opinion that the affidavit upon which the search warrant in this case was issued sufficiently established the requisite probable cause and that

the district court was therefore correct in denying appellant's motion to suppress. *Aguilar* v. *Texas*, 378 U.S. 108 (1964), *Spinelli* v. *United States*, 393 U.S. 410 (1969).

We are further compelled to conclude that the government met its burden of proof as to the firearms being part of an interstate transportation by establishing that the guns had been stolen from New Tazewell, Tennessee, on September 24, 1973 and found in a garage at 1131 Beaumont, Dayton, Ohio, on October 2, 1973. *United States* v. *Craven*, 478 F. 2d 1329 (6th Cir. 1973).

We find no error in the judge's instructions to the jury that the guns seized were "firearms" within the meaning of the statute. The record shows that the government's witnesses described the guns as firearms and other evidence was to the same effect. This evidence was not objected to nor controverted by the appellant and consequently there was no disputed issue of fact for the jury.[1]

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[1]The term "firearm" as used in § 922(j) is defined by § 921(a)(3) as follows:

(3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler of firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

The term "antique firearm" as used in § 921(a)(3) is defined by § 921(a)(16) as follows:

(16) The term "antique firearm" means—

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; and

(B) any replica of any firearm described in subparagraph (A) if such replica—

[1](Continued)

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.

The single remaining issue raised which merits discussion is that of an excessive sentence. It is clear that the case must be remanded on this question as the district court sentenced appellant to six years while the maximum term for a violation of § 922(j) is five years as prescribed by 18 U.S.C. § 924(a).

The judgment of the district court is therefore affirmed in all respects except as to the sentence imposed which is hereby vacated as being in excess of the statutory maximum. The action is remanded to the district court for resentencing the appellant in conformity with 18 U.S.C. §§ 922(j) and 924(a).

ENTERED BY ORDER OF THE COURT

John P. Helman, *Clerk*

No evidence was offered at trial that the guns fell within the statutory exception of "antique firearms." We are of the opinion that the burden of proof to establish the exception rested upon the defendant and that proof that the firearms were not "antique firearms" was not an essential ingredient of the government's case. It is well settled that one who relies on an exception in a statute has the burden to establish it. *McKelvey* v. *United States*, 260 U.S. 353 (1922); *United States* v. *Chodor*, 479 F. 2d 661 (1st Cir. 1973).

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1328

HAROLD JAMES JENKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) the affidavit supporting the warrant to search the residence was defective because it did not set forth underlying circumstances upon which the informant based his conclusions; (2) the government failed to prove that the guns in question were "firearms"; (3) the evidence was insufficient to support a finding that the firearms were moving as, were a part of, or constituted interstate commerce; and (4) the government prosecutor improperly commented during closing argument upon facts not in evidence.

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of having knowingly received, concealed or stored stolen firearms constituting interstate commerce, in violation

of 18 U.S.C. 922(j).[1] Petitioner was sentenced to a term of six years' imprisonment. The court of appeals affirmed (Pet. App. B).[2]

The evidence showed that on September 24, 1973, 224 guns valued at an estimated $80,000, were stolen from the residence of Eph Gose, a licensed firearm collector, in Tazewell, Tennesse (Tr. 4-10). Many of the weapons had been stored in their original cardboard gun boxes at the time of the theft (Tr. 7). Neighbors of Mr. Gose testified that they observed a white panel truck and a pickup truck at the Gose residence on September 24. One neighbor observed two men load into the pickup truck something wrapped in what appeared to be a sheet (Tr. 64-66, 69, 91, 107-110).

A few days after the theft, Treasury Agent Carroll Gibson learned from a confidential informant that a collection of firearms that had been stolen in Tennessee was being stored at a residence at 1131 Beaumont Street, Dayton, Ohio (Tr. 132-133). On September 28, 1973, Agent Gibson began surveillance at 1131 Beaumont Street (Tr. 133). Soon after, he observed petitioner enter the residence. On October 1, 1973, Agent Gibson again observed petitioner enter the residence at 1131 Beaumont Street. Petitioner then left the house and went to the garage.

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[1]Petitioner was indicted on two counts, the second count charging him with knowingly transporting stolen firearms in interstate commerce, in violation of 18 U.S.C. 2314. This count was dismissed by the trial court on petitioner's motion at the close of the government's case. Petitioner's co-defendant, Victor Mills, was charged only with violating 18 U.S.C. 2314. At the close of the government's case, the indictment against Mills was dismissed (Tr. 436).

[2]The court of appeals remanded the case to the district court for resentencing, since the six-year sentence imposed upon petitioner was in excess of that authorized by 18 U.S.C. 924(a), which provides a maximum five-year sentence.

He was carrying long, narrow boxes of a kind that, in Gibson's experience, normally contained rifles or shotguns. Several of the boxes had on them a red-and-black checkered design resembling the Winchester firearms' trademark (Tr. 136). Agent Gibson observed petitioner make several such trips, carrying boxes to the garage (Tr. 136). He also observed another man, who was subsequently identified as Victor Mills, leave the residence (Tr. 136-137). A white panel truck also departed from the vicinity of the residence (Tr. 137-138).

On October 2, 1973, Agent Gibson obtained a warrant to search the premises (Tr. 141, 143). When Agent Gibson and other Treasury agents opened a garage window, they observed that the floor of the garage was covered with guns (Tr. 145). Agent Gibson then entered the garage through the window and proceeded to compare the serial numbers on the guns in the garage with those on the guns that were stolen in Tennessee (Tr. 145). Several of the serial numbers matched (Tr. 145). Gibson then dusted several of the weapons and gun boxes for fingerprints (Tr. 147). A palm print found on one gun box was subsequently identified as belonging to petitioner (Tr. 264, 345-346).[3]

Petitioner and co-defendant Mills subsequently were apprehended in the white panel truck that had been observed earlier at the Beaumont Street residence. They then were arrested and the truck was impounded (Tr. 215-220). On October 4, 1973, the agents obtained a search warrant to search the truck (Tr. 148). Inside the truck they found a gun key that fit a gun case found in the Beaumont garage, a gun slipcover, and cardboard gun boxes whose serial numbers matched those on guns located

[3] The fingerprint of Jame Edward Meadows, the lessee of the white panel truck (Tr. 456-460), was subsequently discovered on another of the boxes (Tr. 356).

in the garage (Tr. 149-151). Cardboard fragments from the truck matched the cardboard of a gun box found in the garage (Tr. 405).

The evidence also showed that petitioner had contracted to purchase the property at 1131 Beaumont Street; the closing date for the purchase was October 9, 1973 (Tr. 280, 284). Two of the lessees testified that petitioner had been visiting the premises about once a week and had access to the garage (Tr. 233, 236, 302-303).

1. Petitioner contends (Pet. 12) that the affidavit supporting the warrant to search the Beaumont Street premises was defective because it did not set forth the underlying circumstances from which the informant concluded that guns that had been stolen in Tennessee were located there, as required by *Aguilar* v. *Texas,* 378 U.S. 108, and *Spinelli* v. *United States,* 393 U.S. 410.

The affidavit disclosed that a confidential informant had advised Agent Gibson that a large number of firearms, primarily "Winchester Lever action" rifles, had been stolen from Tennessee and were being stored at 1131 Beaumont Street, Dayton, Ohio. The informant had proven to be reliable on three separate occasions within the two previous months and had provided Agent Gibson with information that twice had resulted in the seizure of illegal weapons. After receiving the present information, Agent Gibson was able to corroborate the fact that a large number of rifles, primarily of a type described as "Winchester Lever action," recently had been stolen from a residence in Tennesse (Pet. 9-10).[4]

[4]Agent Gibson did not detail in the affidavit the results of the surveillance.

While the affidavit did not set forth the underlying circumstances from which the informant concluded that the stolen guns were located on the premises, it is necessary to apprise a magistrate of such facts only when the affidavit is based "solely on the hearsay report of an unidentified informant." *United States* v. *Harris*, 403 U.S. 573, 576. Here, however, the affidavit was not based solely upon the hearsay report of the informant. It was also based upon the agent's own independent corroboration of several of the facts that the informant disclosed, such as that a large number of guns recently had been stolen in Tennessee and that many of them were "Winchester Lever action" rifles. Cf. *Draper* v. *United States*, 358 U.S. 307. Moreover, the informant's information was sufficiently detailed to belie the possibility that it was a mere "casual rumor." *Spinelli* v. *United States, supra*, 393 U.S. at 416. The independent corroboration, coupled with the agent's knowledge of the informant's proven reliability and the detail with which the information was given, provided an adequate basis from which the magistrate properly determined that probable cause existed for the search. *Id.* at 415.

2. Petitioner also contends (Pet. 19-20) that he was entitled to a judgment of acquittal because the government failed to prove that the guns in question were "firearms" under 18 U.S.C. 922(j).[5] The question whether the guns

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[5]The term "firearm" is defined in the Gun Control Act, 18 U.S.C. 921(a)(3), to include:

> * * *(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

The term "antique firearm" is defined in 18 U.S.C. 921(a)(16) as:

that the government introduced at trial, which had been stolen in Tennessee and recovered on the Beaumont Street premises, were "firearms" within the meaning of the Gun Control Act was, however, a legal issue within the sole competence of the court. The court properly concluded that the guns were "firearms" and so instructed the jury (Tr. 483).

The Gun Control Act, 18 U.S.C. 921(a)(3), defines "firearms" to include "any weapon * * * which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." The inventory list of the 224 stolen guns, introduced into evidence by the government without objection (Tr. 95), indicated each gun's type (revolver, pistol, rifle, or shotgun), make (Colt, Browning, Winchester, etc.), model, caliber, and serial number. It was appropriate for the court to take judicial notice of the commonly known fact that these guns were designed to "expel a projectile by the action of an explosive."[6]

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; and

(B) any replica of any firearm described in subparagraph (A) if such replica—

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.

[6]The popular recognition of these guns as "firearms" is supported by the fact that the guns were characterized as "firearms" throughout the trial (see, *e.g.*, Tr. 6-9, 11, 20), during which time petitioner's counsel never objected to the characterization. Indeed, petitioner's counsel also characterized the guns as "firearms" (Tr. 191-192). See *United States* v. *Beebe*, 467 F.2d 222, 224-225 (C.A. 10), certiorari denied, 416 U.S. 904.

While antique firearms are specifically excluded from coverage of the Gun Control Act (see 18 U.S.C. 921(a)(3) and 921 (a)(16), *supra*,

3. Petitioner further contends (Pet. 15) that the evidence was insufficient to support a finding that the firearms in question were "moving as * * * a part of, or * * * constitute[d], interstate * * * commerce" (18 U.S.C. 922(j)).[7]

Viewed in the light most favorable to the government (*Glasser* v. *United States,* 315 U.S. 60, 80), however, there was ample evidence from which the jury could have found that petitioner's storage and concealment of the firearms was a step in their interstate movement. The firearms were stolen in Tennessee on September 24, 1973, on which date a white panel truck was observed at the residence where the theft occurred. Four days later, on September 28, petitioner was observed at the Beaumont Street residence in Dayton, Ohio, where the stolen firearms were subsequently discovered. On October 1, petitioner was observed carrying gun boxes to the garage of the residence. On October 2, a white panel truck was observed at the residence. A search of the garage on that day revealed the stolen firearms, and a subsequent search of the white panel truck established that it had been used to transport the firearms. The evidence therefore

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fn. 5), petitioner offered no proof that the guns at issue came within that exception. See *McKelvey* v. *United States,* 260 U.S. 353, 357; *United States* v. *Chodor,* 479 F.2d 661 (C.A. 1), certiorari denied, 414 U.S. 912.

[7]Petitioner also contends that it was incumbent upon the government to prove that he transported the stolen firearms, since count 1 of the indictment, charging him with violating 18 U.S.C. 922(j), alleged that he transported as well as stored and concealed them. The fact that the indictment inadvertently contained the allegation of transportation, which is not an element of 18 U.S.C. 922(j), did not, however, affect the validity of the indictment or ultimate conviction, since inclusion of the unnecessary allegation was mere surplusage. See, *e.g., United States* v. *Hyde,* 448 F.2d 815, 839 (C.A. 5); *United States* v. *McGlamary,* 441 F.2d 130, 134 (C.A. 5).

fully supported a finding that the interstate scheme was ongoing at the time the firearms were concealed and stored. See *Lee* v. *United States*, 363 F.2d 469, 475 (C.A. 8), certiorari denied, 385 U.S. 947; *Pearson* v. *United States*, 378 F.2d 555, 560 (C.A. 5).[8]

4. Petitioner contends, finally, that the government prosecutor improperly commented upon facts not in evidence by referring in closing argument to a "large organization" and "continuing investigation" (Pet. 21). While we are unable to examine the remarks in context, since the closing arguments were not transcribed, we note that evidence introduced at trial showed that at least three other persons were likely to have been involved in the interstate transaction.[9] In any event, any error was cured by the

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[8]Petitioner's reliance upon *United States* v. *Ruffin*, 490 F.2d 557 (C.A. 8), is misplaced, since *Ruffin* is fully consistent with the decision in the instant case. In *Ruffin* the defendants were found to be in possession of a firearm which had been stolen 41 days before. The court held that proof demonstrating only that the firearms had at some time in the past moved interstate was insufficient to support a conviction under 18 U.S.C. 922(j). The court reasoned that while the time period between the interstate theft and subsequent possession was a very significant factor in determining the sufficiency of the evidence, "there must also exist other corroborative facts to support the charge that the defendants' possession of the stolen article was an intermediate or final step in the completion of an interstate scheme" (*id.* at 562-563). Such corroborative facts were established in the instant case.

[9]The evidence showed that the theft was accomplished by two unidentified males; Mills and one Bobby Derrick (Tr. 440) were observed, along with petitioner, in the garage of the Beaumont residence on October 2, a short while before the weapons were recovered; the white panel truck had been leased by James Meadows, whose fingerprint was discovered on one of the gun boxes.

court's subsequent instruction that the remarks of counsel in argument or otherwise "do not constitute evidence and * * * should not be considered by [the jury] in arriving at [a] verdict" (Tr. 493). See *United States* v. *Dupart*, 483 F.2d 1393, 1395 (C.A. 5), certiorari denied, 415 U.S. 984; cf. *United States* v. *Roberts*, 481 F.2d 892, 895 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.